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In the Supreme Court of the United States

OCTOBER TERM, 1979

ARLIE B. THOMPSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 19-29) is reported at 606 F. 2d 149.

JURISDICTION

The judgment of the court of appeals was entered on September 27, 1979. A petition for rehearing was denied on November 13, 1979 (Pet. App. 30). The petition for a writ of certiorari was filed on December 13, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the district court's instructions to the jury concerning the admission of co-conspirator statements constituted prejudicial error.

2. Whether the district court may consider the co-conspirator hearsay statements themselves in determining whether the government has proved the existence of a conspiracy by a preponderance of the evidence.

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Kentucky, petitioner and Charles Vinson were convicted of two counts of extorting money (counts two and three) and one count of conspiring to do so (count one), in violation of the Hobbs Act, 18 U.S.C. 1951.[1] Petitioner was sentenced to concurrent three-year terms of imprisonment on counts one and two and to a consecutive five-year term and a $5,000 fine on count three. The sentence on count three was suspended, and petitioner was placed on five years' probation. The court of appeals affirmed (Pet. App. 19-29).

1. The evidence established that petitioner, then a magistrate of Lawrence County, Kentucky, conspired with co-defendant Charles Vinson, the county sheriff, to extort money, and did extort money, from the Riverside Coal Company, which hauled coal through Lawrence County. The scheme originated in the early part of 1978, when Vinson explained to Lindsey Davis, the county jailer, a plan to extort money from coal haulers by threatening them with official harassment unless they made payments (Tr. 374-379).

On April 6, 1978, Vinson and Davis met with James Williamson, the vice-president of Riverside Coal Company, at his office. Vinson told Williamson that unless

[1]Vinson has filed a separate petition for a writ of certiorari, No. 79-830, which raises entirely different issues from these presented by petitioner here, and to which we have separately responded.

Riverside paid him 25 cents per ton of coal hauled through Lawrence County, he would "harass" Riverside's trucks and "see that you don't haul coal" (Tr. 198-206). Williamson replied that he would have to consult with his superiors before he could agree to make such payments. Williamson immediately informed his superiors, who in turn notified the FBI, and an investigation was commenced (Tr. 206-211).

On April 11, Williamson, in a telephone conversation with Vinson that the FBI tape-recorded, arranged to meet the next day to discuss the extortion payments (Tr. 211-215). Williamson met Vinson at his office, as arranged, and they drove to a place where they met Davis. Vinson repeated his threat that unless Riverside made the payments to him he would harass their trucks, explaining that he needed the money to pay his debts. Vinson and Williamson agreed to a reduced price of 15 cents per ton for coal hauled from some mines and 10 cents per ton from others. They also decided that the payments could be picked up by Davis at an abandoned mine site (Tr. 235-245, 395-397). After this discussion, however, Davis told Williamson that he did not want to have anything more to do with the matter (Tr. 243, 398, 400).

On May 10, Vinson met Williamson at his office and arranged for a payment to be made to petitioner on May 12 at a shopping center. Williamson told Vinson that another representative of the company would make the payment in his place (Tr. 253-257). Thereafter, FBI agent Ronald Anderson, posing as Williamson's representative, met petitioner as planned. Anderson asked petitioner if he was "Vinson's man," and petitioner indicated that he was. The agent then handed petitioner an envelope containing $1200, stating that it was the money "to take

care of our trucks" (Tr. 475, 484-485). This transaction was photographed and tape-recorded by the FBI (Tr. 257-258, 464-480).

On June 1, in another tape-recorded conversation, Vinson arranged with Williamson for a payoff to be made on June 6 in the same manner as the previous payment (Tr. 263-265). On June 6, Agent Anderson gave petitioner $1301 at the shopping center in an envelope with Vinson's name on it (Tr. 495, 500). The agent stated that since his last meeting with petitioner, the company's coal trucks had received some 23 tickets for being overweight as they came through Lawrence County, and he asked petitioner if Vinson could handle the tickets. Petitioner stated that Judge Frazier, who was "one of their boys," would handle the tickets for them (Tr. 501). This transaction was both photographed and tape-recorded (Tr. 496-498, 502). Other FBI officials then followed petitioner, arrested him and recovered the marked payoff money. Agents arrested Vinson that same day (Tr. 636, 641-643).

In his defense petitioner testified that he picked up the envelopes on May 12 and June 6 at Vinson's request but that he did not know their contents (Tr. 719-726, 738).

2. During the government's case in chief, the district court admitted testimony describing out-of-court statements of co-defendant Vinson that tended to incriminate petitioner on both the conspiracy and the substantive offenses. In particular, Williamson testified that Vinson told him that petitioner was Vinson's agent in the extortion scheme and would pick up the extortion payments (Tr. 254). Petitioner's counsel objected to the admission of such testimony and several times requested "an instruction." Counsel did not state what the content

of the instruction should be, but he evidently sought an admonition limiting in some way the use to which the jury could put this testimony (Tr. 254). The court admitted the testimony and instructed the jury that Williamson's testimony could not be considered as evidence against petitioner until the jury was satisfied, or the court made a ruling, that there was a prima facie case of conspiracy (*ibid.*). Shortly thereafter the court again instructed the jury that until they were satisfied that there was some evidence establishing a conspiracy and petitioner's role in it, statements made by co-conspirators could not be used against petitioner (Tr. 255).

Following the testimony of FBI agent Anderson, which established petitioner's involvement in the conspiracy, the prosecutor, in a colloquy outside the jury's hearing, moved that the court instruct the jury that co-conspirator statements could now be used as evidence against petitioner (Tr. 511-512). The trial judge informed the prosecutor that he had determined that the government had established a prima facie case of conspiracy, but that he did not wish to advise the jury as to such a technical ruling because it might suggest that the court had made a factual finding favorable to the government (Tr. 512, 515). The prosecutor urged that since the court had determined that the government had sufficiently established the existence of a conspiracy and petitioner's role in it, co-conspirator statements were now admissible as to petitioner; he expressed concern that in light of the court's earlier instructions the jury might have the impression that such statements were not to be used as evidence against petitioner (Tr. 517). The court suggested that it might instruct the jury that it could now consider all the evidence as to both defendants, but not mention the court's ruling as to the existence of the conspiracy (Tr. 518).

The following morning, the court, over defense objections, instructed the jury (Tr. 534):

> Ladies and gentlemen * * * let me advise you that the admonition that I have given you earlier in the case about not considering certain testimony as to [petitioner] is now withdrawn.

ARGUMENT

1. Petitioner first contends (Pet. 10-15) that, given the nature of the court's initial instruction not to consider co-conspirator statements against petitioner until the jury or the court concluded that a prima facie case of conspiracy had been established, the withdrawal of that admonition was reversible error because it implied that the court had made a preliminary finding in the government's favor concerning the existence of a conspiracy.

We agree with the court of appeals' observation (Pet. App. 23) that when a trial judge admits co-conspirator hearsay statements subject to later connection, as was done here, he should not describe to the jury the government's burden of proof on the preliminary question of the existence of the conspiracy, nor should he advise the jury of his finding that the government has adduced sufficient evidence of the conspiracy to support admission of co-conspirator statements. As the court of appeals noted (Pet. App. 23 n.7), however, the district court did not state to the jury his opinion or findings on the conspiracy, but merely informed them that his earlier admonitions not to consider certain testimony against petitioner were now withdrawn. Contrary to petitioner's claim, this would not necessarily have implied that the court believed a conspiracy had been shown. It was at least equally likely that the jury would infer that the judge meant no more by the withdrawal than what he

said in making it, *i.e.*, that his earlier admonition not to consider hearsay statements absent proof of the conspiracy was no longer the rule, and that the jury could consider the statements whether or not a conspiracy had been shown.

To the extent the jury might nonetheless have inferred from the court's remarks that the court believed a conspiracy had been shown, the error was harmless and resulted in no prejudice to petitioner. The government's proof of the conspiracy, as well as of the substantive offense, rested on strong non-hearsay evidence (including tape-recordings of petitioner's own voice as he took payoffs). That proof showed that Vinson and petitioner conspired to extort, and did extort, money from the coal company. There was relatively little co-conspirator hearsay admitted either before or after the district court made its preliminary finding, and the jury had abundant evidence on which to base its verdict.

As to petitioner's role in the conspiracy, Agent Anderson's testimony showed that petitioner on two separate occasions accepted payoffs from Anderson, who was posing as the coal company's representative. That petitioner was aware of the nature of the payments was readily apparent from his own statements made at the time the payoffs were made. When Anderson first met with petitioner on May 12, he inquired whether petitioner was "Vinson's man." Petitioner indicated that he was, and Anderson handed him an envelope containing $1200, stating that it was the money "to take care of our trucks." When Anderson met with petitioner on June 6, he informed petitioner that since the May 12 meeting, the company's coal trucks had received some 23 tickets for being overweight, and he asked petitioner if Vinson could handle the tickets. Petitioner replied that

Judge Frazier, "one of their boys," would handle the tickets for the coal company. In addition, John Hempel, a coal geologist, testified (Tr. 832-837) that during the early part of 1978, following a meeting with Vinson to discuss highway regulations concerning the hauling of coal, he was put in contact with petitioner. Petitioner told Hempel that Hempel and those whom he represented would have to pay 30 cents per ton for all coal hauled on Lawrence County roads; petitioner's explanation for this was that "I have a lot of people that I have to pay" (Tr. 836-837).

Finally, as the court of appeals found (Pet. App. 21), any confusion that might have been caused by the trial judge's comments to the jury was cured by his final instructions, in which he charged the jury that the government had to prove the conspiracy and each conspirator's knowing participation therein beyond a reasonable doubt, and that it was their determination of fact that controlled and not any preliminary ruling by the court.[2]

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[2]The court instructed the jury (Tr. 1494-1496):

> You will recall that during the early stages of the trial [petitioner] by counsel objected to certain testimony being considered by the jury as to him. I sustained those objections and admonished you not to consider that evidence. You will perhaps recall that there came a point during the trial where I withdrew that admonition. That is a technical basis that you need not be concerned about now.
>
> * * * * *
>
> [W]hatever your judgment is, your judgment must be based upon a consideration of the evidence as to the individual defendant and from that evidence you must conclude that guilt was established beyond a reasonable doubt.
>
> * * * * *

2. The court of appeals stated in dictum (Pet. App. 24) that pursuant to Fed. R. Evid. 104(a),[3] the district court may consider the hearsay statements themselves in making the preliminary determination whether a conspiracy has been proved by a preponderance of the evidence. Petitioner contends (Pet. 15-18) that this position, which he states has also been adopted by the First Circuit (*United States* v. *Martorano*, 557 F. 2d 1 (1st Cir. 1977)),[4] conflicts with this Court's decisions in *Glasser* v. *United States*, 315 U.S. 60, 74 (1942), and *United States* v. *Nixon*, 418 U.S. 683, 701 n.14 (1974), and with the Fifth Circuit's decision in *United States* v. *James*, 590 F. 2d 575 (5th Cir. 1979) (en banc), cert. denied, Nos. 78-1412, 78-6369, 78-6431 (June 4, 1979), which indicate that such statements may not be used in making the preliminary determination regarding the existence of a conspiracy. While some disagreement exists among the circuits on this issue, there is no need

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[3]Fed. R. Evid. 104(a) provides:

> *Questions of admissibility generally.* Preliminary questions concerning * * * the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its determination it is not bound by the rules of evidence except those with respect to privileges.

[4]In *United States* v. *Martorano*, *supra*, 557 F. 2d at 12, the First Circuit held that Fed. R. Evid. 104(a) overruled *Glasser* v. *United States*, 315 U.S. 60 (1942), to the extent that *Glasser* held that the hearsay statement itself could not be considered in making the determination whether a conspiracy exists. However, the First Circuit subsequently modified its opinion and declined to decide whether the federal rules partially overruled *Glasser*, holding instead that independent evidence in that case established the existence of a conspiracy and supported the admission of the co-conspirator statements. See *United States* v. *Martorano*, 561 F. 2d 406 (1st Cir. 1977), cert. denied, 435 U.S. 922 (1978).

to resolve the alleged conflict here. The court of appeals' statement was not necessary to its disposition of the case, and there is no evidence whatever that the district judge based his finding of a conspiracy on the co-conspirator statements themselves. As outlined above, ample independent evidence established the conspiracy and justified the admission of co-conspirator declarations against petitioner.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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